Marina Del Rey Hospital *and* California Nurses Association *and* Service Employees International Union, United Healthcare Workers West. Cases 31–CA–029929, 31–CA–029930, 31–CA–030191, and 31–CA–065298

October 22, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On January 16, 2013, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and California Nurses Association (CNA) each filed an answering brief. CNA and Service Employees International Union, United Healthcare Workers West (SEIU) each filed cross-exceptions with supporting argument, the Respondent filed an answering brief, and CNA filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions to the extent consistent with this Decision and Order[2] and to adopt the recommended Order as modified and set forth in full below.[3]

I.

The judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining an unlawful access policy for off-duty employees and by enforcing the policy in a manner that discriminated against union activity. We agree with the judge that the Respondent unlawfully applied the access policy in a discriminatory manner. Unlike the judge, however, we find that the policy was not unlawful on its face.

The policy, contained in the Respondent's employee handbook, states as follows:

> Off-duty employees may access the Hospital only as expressly authorized by this policy. An off-duty employee is any employee who has completed or not yet commenced his/her shift.
>
> An off-duty employee is not allowed to enter or reenter the interior of the Hospital or any Hospital work area, except to visit a patient, receive medical treatment, or conduct hospital-related business. "Hospital related-business" is defined as the pursuit of an employee's normal duties or duties as specifically directed by management.
>
> An off-duty employee may have access to nonworking, exterior areas of the Hospital, including exterior building entry and exit areas and parking lots.
>
> Any employee who violates this Policy will be subject to disciplinary action up to and including termination.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Although the judge explicitly discredited the testimony of Margaret Morgan, the Respondent's director of human resources, that the Respondent had a longstanding practice of prohibiting the wearing of pins and buttons in patient care areas, he did not address similar testimony of two of the Respondent's other witnesses, Supervisor Patricia Heasley and Director of Rehabilitation Services Tammie Bean. For several reasons, we find that the judge implicitly discredited that testimony. First, he explicitly credited the detailed testimony of several of the General Counsel's witnesses that they had openly worn nonunion pins and buttons in patient care areas in the presence of supervisors, contrary to the Respondent's asserted policy. Second, the judge explicitly discredited Heasley's denial that she had seen employees wearing nonunion insignia, noting in the process that "Heasley did not strike me as a particularly credible witness; rather she seemed eager to agree with the Hospital's litigation position rather than simply attempting to relate the facts." Third, although the judge did not evaluate Bean's credibility, Bean testified chiefly in general terms, identifying only one instance prior to 2010 in which she told an employee to remove a nonunion pin. Finally, that the judge "reject[ed], as a matter of fact, the existence of any such past practice" necessarily implies that he rejected other witnesses' contrary testimony as well as Morgan's.

[2] We affirm the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally modifying its appearance and hygiene policy, for the reasons discussed in his decision. In finding that the newly announced policy was consistent with the Respondent's past practice, our dissenting colleague relies largely on testimony that was either expressly or, as noted above, implicitly discredited by the judge. Our colleague also cites the fact that some of the pins formerly worn in patient care areas were distributed by members of management. The new policy, however, allowed *only* pins that had been issued by the hospital, contrary to the Respondent's former policy and practice, neither of which limited the wearing of pins and buttons to those issued by the hospital.

In affirming the judge's findings on this issue, we do not rely on *Albertson's, Inc.*, 319 NLRB 93, 103 (1995), cited by the judge, because in that case no exceptions were filed to the judge's pertinent findings.

[3] The Unions except to the 60-day notice-posting remedy, arguing that the posting period should be extended. They also except to the wording of the notice in several respects. We see no reason to depart from the Board's usual remedial practices. We shall, however, modify the judge's remedy and recommended Order to conform to the violations found, to our amended remedy, and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

As the judge noted, this policy is for all relevant purposes the same as the off-duty access policy found unlawful by the Board in *Sodexo America LLC*, 358 NLRB No. 79 (2012).[4] But, following *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), the Board's original decision in *Sodexho* was vacated on review, and on consideration de novo, the Board applied the principles set forth in *Tri-County Medical Center*, 222 NLRB 1089 (1976), and found that the rule in *Sodexo* was not facially unlawful. *Sodexo America LLC*, 361 NLRB No. 97 (2014).

Under *Tri-County*, an employer's rule barring off-duty employee access to its facility is lawful only if it is limited to the interior of the facility, is clearly disseminated to all employees, and applies to off-duty access for all purposes, not just for union activity. 222 NLRB at 1089. The Board found that the rule in *Sodexo* complied with the last *Tri-County* requirement. (There was no contention that the first two requirements were not met.) The Board held as a matter of policy that affording access to off-duty employees, as members of the public and not as employees, for purposes of receiving medical treatment or visiting patients did not run afoul of the third prong of the *Tri-County* standard. 361 NLRB No. 97, slip op. at 1. The Board further found that the rule's "exception" for conducting "hospital-related business," defined as "the pursuit of the employee's normal duties or duties as specifically directed by management," was "not really an exception at all, but a clarification that employees who are not on their regular shifts, but are nevertheless performing their duties as employees under the direction of management, may access the facility." Id. at 1–2.[5] Accordingly, that provision of the rule did not violate the *Tri-County* requirement that a lawful no-access rule must apply to off-duty access for all purposes. Id. at 2.

As stated, the Respondent's no-access policy in this case is the same in all material respects as the policy in *Sodexo*, and it, too, is therefore lawful on its face. We therefore shall dismiss the complaint insofar as it alleges that the policy is facially unlawful.

However, we agree with the judge that the Respondent's policy was unlawfully applied in a manner that discriminated on the basis of union activity. The record reveals that the Respondent permitted off-duty employees to enter the Hospital for a variety of reasons unrelated to union activity (such as picking up paystubs, submitting scheduling requests, applying for a transfer, and attending social events such as retirement parties and wedding or baby showers). But on at least two occasions, the Respondent applied its off-duty access policy to prevent or curtail off-duty employees from meeting with union representatives in the hospital cafeteria.[6] This evidence supports a finding that the Respondent applied its off-duty access rule in a disparate manner, in violation of Section 8(a)(1).[7] We shall therefore order the Respondent to cease and desist from applying its off-duty access policy in a disparate manner that restricts the exercise of Section 7 rights. However, we shall not order the Respondent to rescind the policy because it is facially lawful.

II.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing payments to the SEIU Industry Education Fund after the parties' 2007–2009 collective-bargaining agreement expired. In its exceptions, the Respondent contends that language in the contract and in the relevant trust agreement and plan documents entitled it to cease making those payments to the Education Fund upon contract expiration.[8] We find no merit in this contention.

A. Facts

Article 18(c) of the 2007–2009 agreement required the Respondent to contribute each year to the Education Fund, according to a formula based on the Respondent's

[4] There, an off-duty access rule was declared unlawful because it contained an exception permitting off-duty employees to enter the facility to "conduct hospital-related business," defined as "the pursuit of the employee's normal duties or duties as specifically directed by management." According to the Board, this exception impermissibly gave management "unlimited discretion to decide when and why employees may access the facility." 358 NLRB No. 79, slip op. at 2.

[5] The clarification was needed because of the rule's unusually narrow definition of "off duty." Id. at 2.

[6] This case does not involve any questions regarding disputed access to the Respondent's premises by union representatives.

[7] The Respondent argues that the complaint allegation that Supervisor Heasley enforced the off-duty employee access policy on August 20, 2010, should be dismissed because the enforcement occurred outside the 6-month period for filing charges under Sec. 10(b). There is no merit in this argument. Although this allegation was added at the hearing on September 28, 2012, it is closely related to the timely charge filed on January 21, 2011, alleging that the Respondent enforced the identical policy on September 21, 2010. See *Redd-I*, 290 NLRB 1115, 1118 (1999) (holding that allegations involving events occurring more than 6 months prior to the amendment of the complaint are considered timely if those allegations are "closely related" to the allegations made in a timely charge). In any event, the enforcement violation is established by the Respondent's September 2010 conduct, for the reasons discussed by the judge.

[8] The Respondent also contends that it had a "sound arguable basis" for its contract interpretation and, accordingly, that the Board should not determine which party's interpretation of the contract is correct. That contention lacks merit. The cases cited by the Respondent involved alleged changes during the term of a collective-bargaining agreement. In this case, the contract expired before the Respondent ceased making fund contributions. See *Finley Hospital*, 362 NLRB No. 102, slip op. at 5 fn. 8 (2015).

payroll for the previous year. Thus, on April 22, 2009, the Respondent made a payment to the Education Fund for the 2008 calendar year, and on May 5, 2010, it made a payment to the Fund for the 2009 calendar year. The Respondent did not make payments to the Fund for calendar years following the contract's expiration on December 31, 2009. The parties commenced bargaining over a successor agreement, but it is undisputed that neither an impasse nor a new contract was reached.

The Respondent argues that it was not obligated to make payments to the Fund following the contract's expiration because, it asserts, various provisions in the collective-bargaining agreement, trust agreement and plan documents collectively waived SEIU's right to bargain over this issue. Specifically, the Respondent contends that the following provisions established that its obligation to make payments to the Education Fund persisted only as long there was a collective-bargaining agreement "presently in force":

Article 18, section C of the contract, "Joint Training and Education Trust Fund":

> The Employer hereby agrees to contribute .22% (twenty-two hundredths of one percent) of the collective bargaining unit's annual gross payroll to the SEIU United Healthcare Workers West and Joint Employer Education Fund. Said contribution payments for the current year shall be payable no later than January 31, 2009 and shall be based on the W-2's for the prior year. In the event of partial years, the employer shall contribute based on a pro rata basis. The employer further agrees to be bound by the terms of the Trust Agreement, the Plan Document, and the rules and regulations adopted by the Trustees of the Fund.

A related provision of the Education Fund's rules and regulations:

> The minimum contribution by participating employers shall be .22% (twenty-two hundredths of one percent) of the gross payroll of the members of the relevant bargaining unit(s), as provided by the parties' collective bargaining agreement(s) during the year prior to the year in which the contribution is due and owing.

Definitions contained in the Education Fund's plan document:

> "Employer" means each Employer who has *presently in force*, or who hereafter executes, a Collective Bargaining Agreement with the Union or participation agreement with the Trustees providing for Contributions to the Fund (emphasis added).
>
> "Collective Bargaining Agreement" means any collective bargaining agreement and any extension, modification or amendment thereof between the Union and any Employer requiring that the Employer make Contributions to the Fund; it also means written participation agreements between the Trustees and any Employer to make contributions to the Fund.
>
> "Contributions" mean the payments require [sic] to be made to the Fund by the Employers pursuant to the applicable Collective Bargaining Agreements. . .

B. Discussion

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." As relevant here, Section 8(a)(5) prohibits an employer from "unilateral[ly] chang[ing] . . . conditions of employment under negotiation." *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Accordingly, once a collective-bargaining agreement expires, the employer is required to maintain contractually established terms and conditions of employment that are mandatory subjects of bargaining until the parties negotiate a new agreement or bargain to a lawful impasse. See *Finley Hospital*, 362 NLRB No. 102, slip op. at 2 (2015).[9]

A Union may waive its right to bargain over changes in a particular employment term, but the waiver must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). "The clear and unmistakable waiver standard . . . requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007).

As we recently explained in *Finley Hospital*, it is important to distinguish between an employer's *contractual* obligation to maintain a particular employment term and condition after the contract expires, and its *statutory* obligation to do so. The term may not survive the expiration of the contract as a *contract* right, but it survives as a component of the *statutory* status quo, unless the union has clearly and unmistakably waived its right to bargain

[9] It is undisputed that employer contributions to employee fringe benefit funds are a mandatory bargaining subject. See *N.D. Peters & Co.*, 321 NLRB 927, 928 (1996).

Sec. 302(c)(6) of the Act authorizes employer payments to industry training funds, provided that the terms under which such payments are made are set forth in a written agreement with the employer. The terms of the expired contract, together with the underlying fund plan documents, satisfy that requirement. See *Made 4 Film, Inc.*, 337 NLRB 1152, 1152 fn. 2 (2002).

over changes to the term. 362 NLRB No. 102, slip op. at 2–3. [10]

Finley Hospital presented such a waiver issue. There, the parties' expired contract provided that the employer would give employees pay raises on their anniversary dates "for the duration of this Agreement." Contrary to the employer's contention, the Board found that that language did not constitute a clear and unmistakable waiver of the union's right to bargain over the employer's postexpiration unilateral discontinuance of those wage increases. The Board reasoned that, although the contract language limited the employer's *contractual* obligation, it did not "mention postexpiration employer conduct in any way, much less expressly permit unilateral employer action." Id. at 3. See also *KBMS, Inc.*, 278 NLRB 826, 849–850 (1986).

Similarly here, the Respondent contends that certain provisions in the collective-bargaining agreement, plan documents, and trust agreement established that its obligation to make payments to the Education Fund persisted only as long there was a collective-bargaining agreement "presently in force." As in *Finley Hospital*, however, none of those provisions clearly and unmistakably authorized the Respondent unilaterally to stop contributing to the Education Fund upon the expiration of the contract. The language cited by the Respondent set forth the Respondent's *contractual* obligation to the fund but did not mention postexpiration conduct in any way or expressly permit unilateral employer action after the contract expired.[11] Accordingly, there was no waiver, and the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing its payments to the Education Fund.

AMENDED REMEDY

We agree with the judge that the Respondent should be ordered to rescind the unlawfully implemented provision of its appearance and hygiene policy. Pursuant to *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005), enfd. in part 475 F.3d 369 (D.C. Cir. 2007), the Respondent may comply with our order of rescission by rescinding that provision and republishing its Policy and Procedures Manual without it. We recognize, however, as we did in *Guardsmark*, that republishing the Manual could be costly. Accordingly, the Respondent may provide new and lawfully worded provisions on adhesive backing that will correct or cover the unlawful provision, until it republishes the Manual without the unlawful provision.

ORDER

The National Labor Relations Board orders that the Respondent, Marina Del Rey Hospital, Marina Del Rey, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying Service Employees International Union, United Healthcare Workers West (the Union) and giving it an opportunity to bargain.

(b) Changing the terms and conditions of employment of its unit employees because they engage in union or other protected concerted activities.

(c) Enforcing the changed appearance and hygiene policy by telling employees that they cannot wear items such as button, pins, and stickers supporting a labor organizations in patient care areas.

(d) Discriminatorily enforcing its no-access rule against employees who seek access to engage in union or other protected concerted activities.

(e) Failing to continue to make payments to the Service Employees International Union, United Healthcare Workers West and Joint Employer Education Fund without first notifying the Union and giving it an opportunity to bargain.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind from its appearance and hygiene policy the provision that "Unless issued by the hospital, items such as buttons, pins, and stickers may not be worn in patient care areas."

(b) Provide a lawfully worded provision on adhesive backing that will cover the unlawful appearance and hygiene provision in the Policy and Procedures Manual, or publish revised Manuals that do not contain the unlawfully implemented provision.

---

[10] This standard is demanding, but hardly impossible to meet. For example, where the parties had agreed to contract language explicitly stating that all company obligations under a pension agreement would terminate when the contract expired, "unless, in a new collective bargaining agreement, such obligation shall be continued," the Board found that the union had clearly and unmistakably waived its right to bargain over the employer's unilateral action with respect to its pension fund obligations after contract expiration. *Cauthorne Trucking*, 256 NLRB 721, 722 (1981), enf. granted in part and denied in part 691 F.2d 1023 (D.C. Cir. 1982).

[11] Our dissenting colleague's reliance on the contract provision that "[i]n the event of partial years, the employer shall contribute based on a pro rata basis" is likewise misplaced. Like the contractual reference to contracts "presently in force," and the "for the duration of this Agreement" provision in *Finley Hospital*, the "partial years" language addresses only the Respondent's *contractual* duty to contribute to the fund, not its *statutory* duty to maintain terms and conditions of employment after the contract expires.

(c) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> *Included*: All full-time, part-time and per diem service and maintenance, technical, skilled maintenance, and business office clerical employees employed by the Employer.
>
> *Excluded*: All other employees, managers, supervisors, confidential employees. guards, physicians, residents, central business office employees (whether facility based or not) who are solely engaged in qualifying or collection activities or are employed by another CFHS Holdings Inc. entity, such as Syndicated Office Systems or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Employer and already represented employees."

(d) Make all delinquent contributions to the Service Employees International Union, United Healthcare Workers West and Joint Employer Education Fund that have not been paid since December 31, 2009, on behalf of unit employees, in the manner described in the Remedy section of the administrative law judge's decision, and continue to make the required contributions until the Respondent bargains with the Union in good faith to an impasse or to an agreement.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of make-whole relief due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Marina Del Rey, California facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 14, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 22, 2015

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent maintains an off-duty access policy that is lawful on its face, although my reasoning differs from my colleagues'.'[1] However, unlike my colleagues, I believe the judge improperly found that the Respondent violated Section 8(a)(5) and (1) regarding its appearance and hygiene policy, which prohibited nonhospital-issued buttons and pins in patient-care areas. Additionally, I believe the judge improperly found that the Respondent violated Section 8(a)(5) by discontinuing contributions to a union

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] I also agree that the Respondent violated Sec. 8(a)(1) by applying its off-duty access policy in a discriminatory manner, resulting in the exclusion of off-duty employees who sought access to engage in union activity while permitting access to other off-duty employees. (This case does not involve any questions regarding disputed access to the Respondent's premises by union representatives.)

fund after the parties' contract expired. I address these issues in turn.

I. RESPONDENT'S OFF-DUTY ACCESS POLICY

The Respondent runs a hospital that maintains a policy restricting off-duty employee access. In relevant part, the policy states:

> An off-duty employee is not allowed to enter or re-enter the interior of the Hospital or any Hospital work area, except to visit a patient, receive medical treatment, or conduct hospital-related business. "Hospital related-business" is defined as the pursuit of an employee's normal duties or duties as specifically directed by management.

My colleagues reason that Respondent's off-duty access policy is lawful based on *Sodexo America LLC*, 361 NLRB No. 97 (2014), in which the Board found that a nearly identical off-duty access policy was also lawful.

I agree that Respondent's off-duty access policy here was lawful, and I agree with the similar outcome in *Sodexo*. However, I would not rely on the Board's reasoning in *Sodexo* because I believe the Board there misconstrued the principles that govern off-duty access policies. The leading case dealing with access rules for off-duty employees is *Tri-County Medical Center*, 222 NLRB 1089 (1976), which holds that an off-duty access ban is valid if it "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." Id. at 1089.

In my view, the Board misconstrued these *Tri-County* principles in two subsequent cases.

First, in *Saint John's Health Center*, 357 NLRB No. 170 (2011), a Board majority (over the dissent of former Member Hayes) held that the third prong of the *Tri-County* standard invalidates all off-duty access restrictions if they permit access for any reason—for example, in *Saint John's*, the off-duty access policy permitting off-duty employees to attend "*Health center sponsored events*, such as retirement parties and baby showers." 357 NLRB No. 170, slip op. at 5 (emphasis added). The Board majority in *Saint John's* focused selectively on part of the *Tri-County* third-prong language (i.e., that a lawful off-duty access rule must apply "to off-duty employees seeking access to the plant *for any purpose*")[2] and held that an off-duty employee no-access policy would be unlawful if it permitted access for any reason. Such a policy would be lawful only if it imposed a blanket prohibition against access by off-duty employees. For reasons similar to those expressed by former Member Hayes in his *Saint John's* dissent, I disagree with such a restrictive reading of *Tri-County*. Under the third prong of *Tri-County*, an off-duty access policy will be lawful if it "applies to off-duty employees seeking access to the plant for any purpose *and not just to those employees engaging in union activity*."[3] Obviously, an off-duty access policy violates the Act if it applies only to off-duty employees seeking access to conduct union activity. Id. However, if the employer's policy does not discriminate against union or other protected concerted activities, I believe it is lawful to permit off-duty employee access for some reasons or with management approval while prohibiting off-duty access for other reasons. Employers have a responsibility to provide a safe and secure workplace, and restrictions on off-duty access may exist for many reasons. Therefore, I believe the third prong of *Tri-County* only reasonably requires that restrictions on off-duty access be nondiscriminatory, and employers may lawfully prohibit off-duty employee access subject to exceptions based on legitimate reasons unrelated to union or other protected concerted activity.[4]

Second, the Board considered similar issues in *Sodexo America LLC*, 361 NLRB No. 97 (2014). That case dealt with a hospital's off-duty access rule that, similar to the policy at issue in this case, contained exceptions permitting off-duty employees to enter the hospital "to visit a patient, receive medical treatment or to conduct hospital-related business," the latter defined as "the pursuit of the employee's normal duties or duties as specifically directed by management." Id., slip op. at 1. Although the off-duty access policy in *Saint John's* was rendered unlawful based on its exceptions (permitting off-duty employee access to attend "Health center sponsored events"), the Board in *Sodexo* concluded that the above-quoted exceptions did *not* invalidate the off-duty employee access policy. Here, rather than recognizing that the "no-exceptions" requirement in *Saint John's* reflected an incorrect reading of *Tri-County*, the Board in *Sodexo* reasoned—with no small amount of creativity—that the first two exceptions (permitting off-duty employees to visit patients or receive medical care) warranted two new, Board-created exceptions to the *Saint John's* "no-

[2] 222 NLRB at 1089 (emphasis added).

[3] Id. (emphasis added).

[4] See also *Saint John's Health Center*, 357 NLRB No. 170, slip op. at 10–11 (Member Hayes, dissenting) ("[N]othing in *Tri-County* mandates that off-duty access rules prohibit all access at all times, regardless of the circumstances, in order to pass legal muster. . . . Read as a whole, [the *Tri-County*] standard embodies the familiar principle that rules are invalid if they discriminate against union activity.").

exceptions" requirement, and the Board concluded that the third exception (permitting off-duty access "to conduct hospital-related business") was "not really an exception at all."[5]

As I indicated in *Piedmont Gardens*, 360 NLRB No. 100, slip op. at 1 fn. 4 (2014), reasonable exceptions should not invalidate an off-duty access rule merely because it recognizes "legitimate business reasons, which cannot be enumerated in advance, that predictably would warrant allowing off-duty employees on the premises." Therefore, I agree the no-access policy at issue here is lawful. However, unlike my colleagues, I would not apply *Sodexo* and distinguish *Saint John's*. Rather, I believe *Saint John's* was wrongly decided based on a misinterpretation of *Tri-County*, and I would find that reasonable exceptions to an off-duty access rule, like those in the policy at issue here, are lawful under the Act.

II. THE APPEARANCE AND HYGIENE POLICY

An employer's bargaining obligations under Section 8(a)(5) include the duty to refrain from implementing any unilateral "change" in working conditions and other mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).[6] Questions about the existence or nonexistence of a "change" generally turn on whether or not the employer's actual practices differed from those previously in effect. Cf. *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574, 1577 (1965) (referring to whether disputed actions "vary significantly in kind or degree from what had been customary under past established practice").

The Board has found that hospital restrictions on the wearing of union-related buttons and similar items in patient-care areas are presumptively valid. *Sacred Heart Medical Center*, 347 NLRB 531, 531 (2006).

Although the wording of the Respondent's appearance and hygiene policy was adjusted in May 2010, I believe the evidence contradicts the allegation that this constituted a "change" from the manner in which the policy had previously been applied. In my view, therefore, the judge incorrectly found that the Respondent implemented a unilateral "change" in the policy in violation of Section 8(a)(5). The absence of a "change" also means the judge improperly found two violations of Section 8(a)(1) (based on the Respondent's alleged change in the policy in response to employees' union activity and its alleged enforcement of the changed policy).[7]

The policy at issue addresses the wearing of adornments such as jewelry. Before May 2010, the Respondent's policy and procedure manual contained a provision stating:

> Small sized jewelry is acceptable. Large or ornate jewelry is not appropriate. Employees may not wear more than two earrings in each ear. Facial jewelry is not acceptable.

In May 2010, the provision was revised to read:

> Small to moderate sized jewelry is acceptable. Large or ornate jewelry is not appropriate. Visible piercings with jewelry or other objects are limited to the ear (maximum of 2 per ear). *Unless issued by the hospital, items such as buttons, pins and stickers may not be worn in patient care areas.* (Emphasis added.)

The record supports the Respondent's contention that the added sentence did *not* constitute a change. Rather, it

[5] Although I agree that the policy in *Sodexo* was lawful, I do not agree with the Board's analysis of the off-duty employee access policy at issue in that case. The Board obviously went to considerable lengths to render *Saint John's* distinguishable. Thus, although the *Sodexo* no-access policy permitted off-duty access to "visit a patient" or "receive medical treatment," these exceptions were declared "unrelated to . . . employment" because employees seeking access for these purposes would "seek access not as employees, but as members of the public." *Sodexo*, 361 NLRB No. 97, slip op. at 1. The *Sodexo* Board created two exceptions to the *Saint John's* "no-exceptions" requirement, stating: "We decline as a matter of policy to require that health care employers limit their employeees' access to medical care, or to friends and family members receiving medical care, in order to comply with the *Tri-County* requirements." Id. As for the third exeption in *Sodexo*—permitting off-duty access to "conduct hospital-related business," defined in part to include "duties as directed by management"—the Board reasoned that the "most natural reading" of this policy language was that "this provision is *not really an exception at all*, but a clarification that employees who are not on their regular shifts, but are nevertheless performing their duties as employees under the direction of management, may access the facility." Id., slip op. at 1-2 (emphasis added). The Board concluded: "Although these employees would be *off* duty by the policy's definition, they are *on* duty under the term's ordinary meaning and within the meaning of *Tri-County*." Id., slip op. at 2 (emphasis in original).

Member Johnson agreed that the policy in *Sodexo* was "significantly different from the policy found unlawful in *Saint John's*," but he found no need to address "whether the issue in that case was correctly decided." Id., slip op. at 2 fn. 3.

[6] In *Katz*, the Supreme Court held that "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of section 8(a)(5) much as does a flat refusal [to bargain]." Id.

[7] In support of his finding that the Respondent changed its appearance and hygiene policy in 2010, the judge relied on evidence that the policy was previously enforced in an inconsistent manner. As noted below, I believe the record does not support these findings by the judge. It is also significant that the complaint did not allege, and the judge did *not* find, that the Respondent violated Sec. 8(a)(1) by enforcing its policy in a manner that discriminated against union activity (i.e., by permitting the wearing of nonhospital-issued nonunion buttons and pins in patient-care areas while prohibiting the wearing of union buttons and pins in patient-care areas).

was in line with the Hospital's preexisting practice of prohibiting non-pproved pins and buttons in patient-care areas.

In 2004, the Respondent's current owner, CFHS Holdings, acquired Marina Del Rey Hospital from Tenet Healthcare Systems. Three witnesses—Margaret Morgan, Patricia Heasley, and Tammie Bean, each of whom began her employment at the Hospital when it was owned by Tenet[8]—testified that the Hospital prohibited nonhospital-issued buttons and pins in patient-care areas, and this policy dated back to the Tenet era. Morgan testified that the Respondent "inherited" this policy from Tenet in 2004 when the Hospital changed owners. Heasley testified that the Tenet policy was to prohibit nonhospital-issued buttons and pins in patient-care areas, and the policy continued unchanged until she left the Hospital in 2012. Bean testified that the prohibition in patient-care areas of nonhospital-issued "pins, buttons, whatever" has been in place as long as she could remember, and at least since 1995.[9]

This evidence is corroborated by events that occurred in March 2009 (more than a year *before* the Respondent allegedly changed its appearance and hygiene policy), when the Respondent directed nurses represented by the California Nurses Association (CNA) *to stop wearing buttons with union insignia in patient-care areas*.[10] A CNA official asserted that the Hospital had committed an unfair labor practice by implementing a "blanket" prohibition against wearing union buttons. Significantly, Morgan replied that the Hospital had not adopted a blanket prohibition, but it was "asking the nurses to take them off in patient care areas, *as was our practice*" (Tr. 577, emphasis added). Neither did CNA file any charge alleging that this instruction by the Hospital constituted a change in Respondent's appearance and hygiene policy.[11]

Substantial evidence supports the Respondent's contention that the one-sentence addition in May 2010 operated to conform Respondent's written policy and procedure manual to the actual policy that was being applied. Viewing the record as a whole, I would find that the General Counsel failed to sustain his burden to prove by a preponderance of the evidence that this adjustment in the policy and procedure manual constituted a "change." Accordingly, I would dismiss the alleged 8(a)(5) violation and the two 8(a)(1) violations that are predicated on the existence of such a "change."

III. DISCONTINUATION OF FUND CONTRIBUTIONS

I also respectfully disagree with my colleagues' finding that Respondent violated Section 8(a)(5) when it discontinued making contributions to the SEIU's Joint Employer Education Fund (the Fund) after its SEIU collective-bargaining agreement (CBA) expired on December 31, 2009. Relevant provisions in the expired CBA and the Fund's "Plan Document" establish that the parties intended to limit the Respondent's payment obligation to the term of the CBA.

Article 18, section C of the expired CBA provided as follows:

> The Employer hereby agrees to contribute .22% (twenty-two hundredths of one percent) of the collective bargaining unit's annual gross payroll to the SEIU United Healthcare Workers West and Joint Employer Education Fund. Said contribution payments for the current

[8] Morgan, the Respondent's director of human resources, has worked at the Hospital since 1980; Bean, its director of rehab services, has worked there since 1995; and Heasley, formerly director of the telemetry, med-surg, and ortho Spine units, worked at the Hospital from 2000 to 2012.

[9] The judge discounted Morgan's testimony that the Respondent's consistent *practice* was to prohibit nonhospital-issued buttons and pins in patient-care areas, based on testimony that some employees wore unauthorized buttons and pins and were not told to remove them. However, three of the pins the judge cited as tending to contradict the Respondent's defense were *authorized by Hospital personnel*. Therefore, these examples were consistent with the prior existence of the policy the Respondent is alleged to have "changed." Bariatric Team Coordinator Bridget Agee distributed a "DVT" pin (for "deep vein thrombosis") and a button shaped like a tape measure indicating that a patient was losing weight following bariatric surgery. Director of Rehab Services Tammie Bean approved distribution of a "little red dress" pin from the American Heart Association. Besides being Hospital-authorized, these pins also reflected the Hospital's mission, as did the pink ribbon worn by some employees during breast cancer awareness month. Other pins and buttons—a Jamaican flag pin, a service award pin, a nursing school pin, a "Jingle for Jesus" button, sports-team buttons—could not reasonably be regarded as "remindful of the tensions of the marketplace." *NLRB v. Baptist Hospital*, 442 U.S. 773, 783 fn. 12 (1979). Therefore, there is no inconsistency between permitting them while disallowing union-related buttons in patient-care areas. As noted previously, the Board has found such restrictions to be presumptively valid, *Sacred Heart Medical Center*, 347 NLRB at 531, and there is no allegation that these restrictions were discriminatory on the basis of union activity. See fn.7, supra.

More generally, although the judge discredited Morgan's testimony about Hospital practice, he did not even mention the testimony by Heasley and Bean (as well as Morgan) regarding the longstanding *policy* against non-approved pins and buttons in patient-care areas, nor did the judge make any adverse credibility findings regarding this testimony by Heasley and Bean. Thus, their testimony is unrebutted regarding the prior existence of such a policy.

[10] CNA represents a unit of the Respondent's registered nurses. Service Employees International Union, United Healthcare Workers West (SEIU) represents a unit of the Respondent's nonprofessional employees.

[11] The charge in the instant case was filed by the SEIU, not the CNA. The record reveals that the SEIU representative who challenged the Respondent's policy began working for SEIU at the Hospital in December 2009, long after the March 2009 exchange between the Hospital and CNA.

> year shall be payable no later than January 31, 2009 and shall be based on the W-2's for the prior year. *In the event of partial years, the employer shall contribute based on a pro rata basis*. The employer further agrees to be bound by the terms of the Trust Agreement, the Plan Document, and the rules and regulations adopted by the Trustees of the Fund. (Emphasis added.)

The "Plan Document" referenced in article 18, section C defines the following terms:

> "Employer" means each Employer who has presently in force, or who hereafter executes, a Collective Bargaining Agreement with the Union or participation agreement with the Trustees providing for Contributions to the Fund.
>
> "Collective Bargaining Agreement" means any collective bargaining agreement *and any extension, modification or amendment thereof* between the Union and any Employer requiring that the Employer make Contributions to the Fund; it also means written participation agreements between the Trustees and any Employer to make contributions to the Fund.
>
> "Contributions" mean the payments require [sic] to be made to the Fund by the Employers *pursuant to the applicable Collective Bargaining Agreements*. (. . . Emphasis added.)

These provisions make clear that the Respondent and the SEIU agreed that the Respondent would be obligated to make contributions to the Fund during the term of the CBA, and *only* during the term of the CBA:

- "Contributions" are payments required to be made to the Fund by "Employers" *pursuant to* a "Collective Bargaining Agreement."
- The definition of "Collective Bargaining Agreement" includes existing agreements and extensions, modifications, and amendments of existing agreements.
- An "Employer" is each Employer *who has presently in force or hereafter executes a Collective Bargaining Agreement*.
- Most important, Article 18, Section C states that "[i]n the event of partial years, the employer shall contribute based on a pro rata basis." *The phrase "partial years" (plural) can be given effect only if one regards the payment obligation—which is expressly limited to a "pro rata" contribution—as being conditioned on the existence of an agreement*. This is clear from the reference to *two* partial years: one partial year between the agreement's effective date and the end of the then-current calendar year, and a second partial year between January 1 of the calendar year in which the agreement expires and the agreement's expiration date.

These provisions—especially the provision for a "pro rata" payment during the two "partial" years, one immediately following the agreement's effective date, and the second immediately preceding the agreement's expiration date—reasonably permit no interpretation other than that the parties intentionally limited the duty to make Fund payments to the duration of the CBA. The same interpretation is reinforced by the other definitions quoted above.

Although my colleagues rely on a distinction between contractual obligations that apply during the term of a collective-bargaining agreement and the statutory duty to maintain the status quo after an agreement expires, the existence or absence of any postexpiration duty remains dependent on the parties' intent.[12] Also, the Act prohibits the Board from imposing on parties a substantive contract term contrary to what they have elected to put into their own agreement.[13] In the instant case, I believe the collective-bargaining agreement is susceptible only to one reasonable interpretation, which is that the obligation to make Fund contributions is coextensive with the agreement's term.[14]

Accordingly, as noted above, I respectfully concur in part and dissent in part.

---

[12] See *Nolde Bros., Inc. v., Bakery Worker Local 358*, 430 U.S. 243, 255 (1977) (Supreme Court suggests that the potential postexpiration duty to arbitrate grievances arising during a collective-bargaining agreement's term, notwithstanding the presumptions favoring arbitrability, may be "negated expressly or by clear implication" in contract language).

[13] See Sec. 8(d) (providing that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession"); *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970) (the Board lacks the authority to impose substantive contract terms on any party).

[14] I do not believe the disposition of this case is affected by *Finley Hospital*, 362 NLRB No. 102 (2015), relied upon by my colleagues. There, a 1-year collective-bargaining agreement contained a provision requiring the employer to grant a 3-percent wage increase to each unit employee on his or her anniversary date "[f]or the duration of this [a]greement." After the agreement expired, the employer stopped giving wage increases. The Board majority held that the employer violated Sec. 8(a)(5) because, among other things, the contract did not "mention postexpiration employer conduct in any way." Id., slip op. at 3. Unlike *Finley Hospital*, the parties' CBA and the Plan Document here clearly and unmistakably provide—in multiple unambiguous contract terms— that contributions to the Fund were conditioned on the existence of an effective agreement. Although former Member Johnson dissented from *Finley Hospital*, and I agree with the views expressed in his dissenting opinion, the result here would be the same whether or not one relies on the majority or former Member Johnson's dissent.

Dated, Washington, D.C. October 22, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying Service Employees International Union, United Healthcare Workers-West (the Union) notice and giving it an opportunity to bargain.

WE WILL NOT change your terms and conditions of employment because you engaged in union or other protected concerted activities.

WE WILL NOT enforce the unlawfully changed appearance and hygiene policy by telling employees that they cannot wear items such as buttons, pins, and stickers supporting a labor organization in patient care areas.

WE WILL NOT discriminatorily enforce our no-access rule against employees who seek access to engage in union or other protected concerted activities.

WE WILL NOT fail to continue to make payments to the Service Employees International Union, United Healthcare Workers West and Joint Employer Education Fund without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the following from the appearance and hygiene policy: "Unless issued by the hospital, items such as buttons, pins and stickers may not be worn in patient care areas."

WE WILL provide a lawfully worded provision on adhesive backing that will cover the unlawful appearance and hygiene provision in the Policy and Procedure Manual, or WE WILL publish revised Manuals that do not contain the unlawfully implemented provision.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> *Included*: All full-time, part-time and per diem service and maintenance, technical, skilled maintenance, and business office clerical employees employed by the Employer.
>
> *Excluded*: All other employees, managers, supervisors, confidential employees. guards, physicians, residents, central business office employees (whether facility based or not) who are solely engaged in qualifying or collection activities or are employed by another CFHS Holdings Inc. entity, such as Syndicated Office Systems or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Employer and already represented employees."

WE WILL make all delinquent contributions to the Service Employees International Union, United Healthcare Workers West and Joint Employer Education Fund that have not been paid since December 31, 2009, on behalf of unit employees, and will continue to make the required contributions until we bargain with the Union in good faith to an impasse or to an agreement.

MARINA DEL REY HOSPITAL

The Board's decision can be found at www.nlrb.gov/case/31–CA–029929 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., , Washington, D.C. 20570, or by calling (202) 273–1940.

Rudy Fong Sandoval, Nicole A. Buffalano, and *Roufeda S. Ebrahim, Esqs.,* for the General Counsel.
Richard Falcone and *Mark W. Robbins, Esqs. (Littler Mendelson, P.C.),* of Los Angeles, California, for the Respondent.
Monica T. Guizar, Esq. (Weinberg, Roger, & Rosenfeld), of Los Angeles, California, for the SEIU.
Brendan White, Esq., Legal Counsel, of Oakland, California, for the CNA.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on September 28 and October 17–18, 2012. The California Nurses Association (herein CNA) filed the charge in Case 31–CA–029929 on September 13, 2010, the Service Employees International Union, United Healthcare Workers-West (herein SEIU) filed the charges in 31–CA–029930, 31–CA–030191, and 31–CA–065298 on September 13, 2010, April 26, 2011, and September 21, 2011, respectively, and the General Counsel issued an order consolidating cases, third amended consolidated complaint and notice of hearing[1] on May 30, 2012. The remaining portions of the complaint, as amended at the hearing, allege that Marina del Rey Hospital (herein the Hospital) violated Section 8(a)(1) and (5) by issuing and enforcing a written appearance and hygiene policy that states "Unless issued by the hospital, items such as buttons, pins and stickers may not be worn in patient care areas." The complaint also alleges that the Hospital violated Section 8(a)(1) by maintaining and enforcing the following rule: "An Off-duty employee is not allowed to enter or re-enter the interior of the Hospital or any Hospital work area, except to visit a patient, receive medical treatment, or to conduct hospital related business." Finally, the complaint alleges that the Hospital violated Section 8(a)(5) by unilaterally ceasing to make payments to the SEIU and Joint Employer Education Fund. The Hospital filed a timely answer that, as amended at the hearing, admits the allegations in the complaint concerning interstate commerce and jurisdiction, labor organization status, supervisory and agency status, appropriate units, and the 9(a) status of the CNA and SEIU; the Hospital denied it had committed any unfair labor practices. The Hospital claimed it was without sufficient knowledge and therefore denied the allegations in the complaint concerning the filing and service of the charges; that answer is clearly frivolous and, on my own motion, I strike it. In any event the formal papers clearly establish that the charges were filed and served as alleged in the complaint. The Hospital pled 16 affirmative defenses to the original complaint, ranging from "waiver, estoppel and/or unclean hands" to "the National Labor relations Board does not have jurisdiction to adjudicate disputes over the interpretation of collective-bargaining agreements and the parties' rights and obligations under such agreements." The entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Hospital, and the CNA, I make the following.

FINDINGS OF FACT

I. JURISDICTION

The Hospital, a California corporation, provides inpatient and outpatient medical care at its facility in Marina del Rey, California, where it annually derives gross revenues in excess of $250,000 and purchases and receives products, goods, and services valued in excess of $5000 directly from points outside the State of California. The Hospital admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the CNA and SEIU are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Hospital recognizes the CNA as the representative for a unit of nurses.[3] The Hospital recognizes the SEIU as the representative of a unit of the remaining nonprofessional employees.[4] The most recent contract for that unit expired on December 31, 2009. On February 3, 2010, a decertification petition was filed in Case 31–RD–001601 involving the SEIU represented unit of employees. An election was held and the employees voted to retain the SEIU.

B. Buttons, Pins, and Stickers Allegations

The complaint alleges that in May 2010 the Hospital violated Section 8(a)(5) when it unilaterally issued a written appearance

[1] The complaint covered many other charges; I granted a motion to sever those other charges and they were settled. The remaining substantive allegations in the complaint are pars. 12(a), (c), (e), and (f), 18, 19, and 22.

[2] The General Counsel's unopposed motion to correct transcript is granted.

[3] More specifically:
Included: All registered nurses employed by Marina del Rey Hospital at its facility located at 4650 Lincoln Blvd., Marina del Rey, California.
Excluded: All other employees, guards and supervisors.

[4] More specifically:
Included: All full-time, part-time and per diem service and maintenance, technical, skilled maintenance, and business office clerical employees employed by the Employer.
Excluded: All other employees, managers, supervisors, confidential employees. guards, physicians, residents, central business office employees (whether facility based or not) who are solely engaged in qualifying or collection activities or are employed by another CFHS Holdings Inc. entity, such as Syndicated Office Systems or Patient Financial Services, employees of outside registries and other agencies supplying labor to the Employer and already represented employees.

and hygiene policy as follows: "Unless issued by the hospital, items such as buttons, pins and stickers may not be worn in patient care areas." The complaint also alleges that the Hospital violated Section 8(a)(1) when it issued that policy in response SEIU activity and in order to discourage such activity.

The Hospital has a handbook that it provides to employees; that handbook has a section entitled "Appearance and Hygiene" that instructs employees concerning the need for good hygiene and cleanliness and tells employees "You are required to present a clean and neat appearance and dress according to the requirements of your position." It does *not* mention anything about the wearing of buttons or pins.

Other versions of the Hospital's "Appearance and Hygiene" policy have existed in the Hospital's Policy & Procedure Manual. Unlike the employee handbook that is distributed to employees, the Policy and Procedure manuals are located on shelves in the departments of the Hospital and are used as needed by managers and supervisors as a resource. Employees, on the other hand, rarely have occasions to use those manuals. For example, Paulette Navarro works for the Hospital as a licensed clinical social worker; she has worked there since June 2008. Navarro credibly explained that she was aware of the fact that there were manuals kept in offices at the Hospital but she never had occasion to examine their content. In any event, one version of that policy in that manual indicates that it was last reviewed in August 2009 and last revised on April 28, 2004. Like the employee handbook, it does *not* mention anything about wearing buttons or pins. Rather, it has a section entitled "Jewelry" that reads:

> Small sized jewelry is acceptable. Large or ornate jewelry is not appropriate. Employees may not wear more than two earrings in each ear. Facial jewelry is not acceptable.

Margaret Morgan is the Hospital's director of human resources; she admitted that this was the policy that was in place from at least 2004 until the spring of 2010. Morgan admitted that at that time the version of the policy in the manual, but not the handbook, was changed. The changed version read:

> Adornments: Jewelry, Buttons, Pins, Stickers, or Similar Items:
>
> Small to moderate sized jewelry is acceptable. Large or ornate jewelry is not appropriate. Visible piercings with jewelry or other objects are limited to the ear (maximum of 2 per ear). *Unless issued by the hospital, items such as buttons, pins and stickers may not be worn in patient care areas.* In addition, all such items must be appropriate for the work place and may not be excessive in number or size and cannot cover or interfere with hospital issued ID badges. (Emphasis added)

However, that revised policy continued to indicate that it last been reviewed in August 2009 and last revised on April 28, 2004.[5]

[5] I completely discredit Morgan's explanation as to why the Hospital did not indicate it had revised that policy. Rather, I agree with the General Counsel's observation in his brief that this "suggests at best [that the Hospital] acted misleadingly, and at worst, dishonestly."

What caused the Hospital to revise the manual? Morgan admitted that beginning in March 2009 employees began wearing union buttons and pins and that the Hospital reacted by asking the employees to remove them while in patient care areas. On March 12, 2009, Patricia Heasley, then a supervisor for the Hospital, sent Morgan a message indicating that she "just noticed several nurses . . . are wearing stickers on uniform, on badges . . . stethoscopes." Morgan replied:

> If we have been consistent with not allowing them to wear other types of stickers not related to work— ask them to take them off as we do not allow it—if a problem with any individual resisting let me know and I will call the union."

That same day Heasley answered "The employees did not argue but I was surprised by the increase in number of nurses now sporting the stickers." This, in turn, prompted the following message from a CNA representative to Morgan entitled "Union Buttons" dated March 12, 2009:

> Farah [Davari] tells me you have implemented a ban on wearing of union buttons/stickers. I am including a link to a 9th circuit court decision reaffirming that hospital commits an unfair labor practice when it issues blanket prohibitions regarding the wearing of union buttons.

Morgan admitted that these events caused the Hospital to revise the manual. It did so as follows. On May 14, 2010, Morgan sent a message to the Hospital's supervisors that read:

> This is a reminder that the attached HR Policy for Appearance and Hygiene is to be uniformly enforced. Please review the section on adornments, i.e. jewelry, buttons, pins, and stickers.

Attached to the message was the new version of the policy, described above, that banned the wearing on buttons in patient care areas. Hospital supervisors began enforcing that policy and employees began complaining to the SEIU about that enforcement. So on May 19, 2010, the SEIU sent Morgan a message protesting that the Hospital was prohibiting the employees from wearing union buttons and stickers. The next day Morgan replied that "A hospital can lawfully prohibit union buttons in immediate patient care areas. That is what we are saying, not that they can't wear buttons otherwise." On May 21 Morgan sent a memo to the Hospital "Leadership" as follows:

> SEIU is objecting to our policy regarding prohibition of non hospital issued badges, buttons, etc. They have communicated this objection via flyers (which you will see on their bulletin boards) and letters.
>
> Our policy is legal and has been supported by case law. We *are* legally able to prohibit the wearing of such items in patient care areas.
>
> Be sure to enforce this policy uniformly. Let me know if you have any questions.
>
> PLEASE POST THE ATTACHED COMMUNICATION ON YOUR BREAKROOM BULLETIN BOARD OR OTHER APPROPRIATE AREA—we are also posting on our bulletin boards in the cafeteria and the employee entrance.

This attachment to the message that was posted on the bulletin boards at the Hospital read:

> SEIU is objecting to our policy regarding prohibition of non hospital issued badges, buttons, etc. They have communicated this objection via flyers (which you will see on their bulletin boards) and letters.
>
> Our policy is legal and has been supported by case law. We *are* legally able to prohibit the wearing of such items in patient care areas.
>
> Be sure to enforce this policy uniformly. Let me know if you have any questions.

It was at this time that Hospital's revised policy became widely known to employees in writing; this was done without prior notice or an opportunity to bargain by the SEIU.

The Hospital contends that revised *policy* reflected the existing *practice* regarding the wearing of buttons notwithstanding the fact that the policy was not included in either the handbook or the manual prior to 2010; in doing so it relies in part on Morgan's testimony. In this regard the Hospital's counsel asked Morgan "And . . . does the addition of the sentence we're talking about . . . reflect the practice of the hospital since you've been employed by it?" Morgan answered "Yes." I simply do not credit this testimony. It was obtained in a leading fashion, Morgan's demeanor was unconvincing, and it is contrary to the more credible testimony that I now describe. Gloria Gilmore worked at the Hospital from November 2006 until April 29, 2011.[6] Gilmore worked as a certified nursing assistant in the med-surg department. Gilmore wore several different buttons on her uniform at the Hospital. During the holiday seasons in 2009 and 2010, Gilmore often wore a button that read "Jingle for Jesus." That button was oval shaped and about 1½ inches wide; three tiny bells are attached to it. She wore that button throughout the facility for her entire 12-hour shift. Although Gilmore regularly saw her supervisor, Patricia Heasley, during her shift, Heasley never asked her to remove that button. Gilmore also wore, without incident, a pin shaped as a ribbon with a small rectangle bearing the letters "DVT", short for deep vein thrombosis. Bridget Agee, the Hospital's bariatric team coordinator, gave the pin to employees and Gilmore wore it on her uniform while at work for several weeks in late 2010. Again, she wore the pin throughout her 12-hour shift, including in patient care areas. Another button that Agee gave Gilmore was shaped as a tape measure indicating that someone was losing weight in relation to have received gastric bypass or lap band surgeries. Another pin was the flag of Jamaica. Gilmore wore that pin on her uniform 3 of 4 days a month during 2009 and 2010 for her entire shift. Gilmore was given a service award pin when she worked at another medical facility before working for the Hospital; she wore that pin on her uniform also. In 2010 she and other employees wore buttons shaped like a little red dress. No one from the hospital informed Gilmore that she could not wear those buttons and pins.[7] Marla Joy Liberty worked at the hospital intermittently from January 6, 1986, until her retirement on March 1, 2012; she worked as a registered nurse. Prior to February 2010 Liberty had worn a breast cancer research pin, a nursing school pin, a heart research pin in the form of a little red dress,[8] and a sport team button on her uniform while at work, all without incident. In February 2010, Liberty was wearing a button in the telemetry unit that was 2½ to 3½ inches in diameter and that read "CNA." Heasley told her that the button was too large and that Liberty could not wear it. Mary Lynne Brown works at the Hospital as a physical therapist assistant; she has worked there since September 2000. Brown also wore buttons on her uniform at work. One button was pink and shaped like a ribbon; this was meant to indicate support for Breast Cancer Awareness. Brown wore this button during Breast Cancer Awareness Month. She also occasionally wore the little red dress pin. Indeed, in 2009, at the behest of Tambria Elizabeth Bean, the Hospital's director of rehab services and Brown's supervisor, Brown sold cookbooks to coworkers for $5 to raise funds. Per Bean, Brown gave each purchaser a little red dress pin to wear.[9] Brown saw coworkers wearing buttons for sports teams; they wore these buttons in patient and non patient care areas. Laura Falcon has worked for the Hospital since March 2007 as a surgical technologist. Almost every day she has seen employees wearing buttons supporting the Lakers, Dodgers, breast cancer awareness, and other buttons. Falcon also was a steward for the SEIU. In about March 2010, her coworkers began complaining to her that managers were telling them to remove buttons or that they could only wear one button. During that time period bargaining was still ongoing and the date for the decertification election had been set. So a meeting on May 10, 2010, was arranged with Fred Hunter, the Hospital's CEO, in his office. Falcon told Hunter that the reason for the meeting was because there were discrepancies in different departments regarding the wearing of buttons. Hunter replied "They're working on it right now as we speak." Four days later Falcon saw the policy manual version that included the portion concerning wearing pins; it posted in the break room in the surgery department. That was the first time she had seen that policy. Rosanna Mendez works for the SEIU; she was the lead negotiator for that union with the Hospital during a period of time in 2009 and 2010. As such she visited the Hospital during and saw employees wearing different items on their uniforms supporting the SEIU. At some point employees began complaining to her that they were being required to remove those items from their uniforms. On July 6, 2010, she sent an email to the Hospital complaining about several things, including that the Hospital was harassing employees by telling them that they could not wear union buttons. In that message Mendez describes the May 10 meeting with Hunter, described above by Falcon. She wrote:

[6] Her discipline and termination were alleged to be unlawful in the complaint but those allegations were settled as part on the non Board adjustment described above.

[7] Heasley, Gilmore's supervisor, denied seeing Gilmore wear these buttons, but I do not credit that testimony. Heasley did not strike me as a particularly credible witness; rather she seemed eager to agree with the Hospital's litigation position rather than simply attempting to relate the facts. Moreover, Gilmore produced the buttons that she wore and it is unlikely that some of them at least (e.g. "Jingle for Jesus" with bells attached) would have gone unnoticed.

[8] The little red dress pin is a large rectangular pin measuring 3½ by 2 inches and bearing the image of a red dress and a smaller red heart next to "American Heart Association."

[9] Bean admitted that she gave employees this pin and cookbook in exchange for a contribution.

> Mr. Hunter, as you will recall, a small group of our members met with you on May 10, 2010 to discuss anti-Union activities by management, including allowing harassment and discrimination against pro-Union employees. They gave you specific examples of disparate treatment including managers telling them they couldn't wear Union buttons – which had not previously been brought up as an issue at the facility. As the members noted, you said you wanted to ensure folks were wearing only one Union button, not multiple buttons, stickers, etc. and managers began to enforce something that had never been in effect. We objected to this policy but it is still being enforced.

The Hospital never gave the SEIU an opportunity to bargain about the policy it posted concerning buttons.

ANALYSIS

An employer violates Section 8(a)(5) and (1) when it changes working conditions of union-represented employees without first giving the union notice and opportunity to bargain concerning the changes. *NLRB v. Katz,* 369 U.S. 736 (1962). I have concluded that the Hospital did not give the SEIU notice and an opportunity to bargain before it revised its dress code policy to include the following sentence "Unless issued by the hospital, items such as buttons, pins and stickers may not be worn in patient care areas*."* Dress codes are mandatory subjects of bargaining, especially where failure to comply with them may result in discipline. *Medco Health Solutions of Las Vegas,* 357 NLRB No. 25 (2011), enfd. in relevant part *Medco Health Solutions of Las Vegas v. NLRB,* _ F.3d _ (D.C. Cir. 2012); *Yellow Enterprise Systems,* 342 NLRB 804, 827 (2004), *Albertson, Inc.,* 319 NLRB 93, 103 (1995). In its brief the Hospital argues that it "has had a longstanding practice of enforcing a rule that prohibits the wearing of pins and buttons in patient care areas unless the pin or button was issued by Respondent." In doing so the Hospital relies on evidence that I have rejected as not being credible and I reject, as a matter of fact, the existence of any such past practice. By changing its appearance and hygiene policy without first giving the SEIU an opportunity to bargain about the change, the Hospital violated Section 8(a)(5) and (1).

An employer violates Section 8(a)(1) of the Act when it changes a policy affecting working conditions as a response to activities by employees that are protected by Section 7. *Associacion Hospital del Maestro,* 283 NLRB 419, 425 (1987). I have already concluded above that the Hospital changed it appearance and hygiene policy and that this change impacted the working conditions of employees. I now examine the Hospital's motivation for the change. All the credited evidence, described in detail above, leads to the conclusion that it did so because employees began wearing buttons and the like supporting the SEIU and the CNA. Indeed, Morgan admitted the addition of the sentence to the policy manual came about because employees began wearing items supporting a union and the SEIU protested the fact that the Hospital began to restrict that activity. Of course, absent a lawful policy restricting that activity, wearing union buttons and the like is activity protected by Section 7. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 801–803 (1945). The Hospital argues that under *NLRB v. Baptist Hospital,* 442 U.S. 773 (1979), and similar Board decisions, the rule it promulgated is presumptively valid. But the Hospital thereby confuses the promulgation of presumptively valid rules for nondiscriminatory reasons with the promulgation of the same rules in response in to union activity; in the latter circumstances, the promulgation of the rules, even if facially presumptively valid, is nonetheless unlawful. *City Market, Inc.,* 340 NLRB 1260 (2003). By changing its appearance and hygiene policy because employees engaged in union activity, the Hospital violated Section 8(a)(1).

The complaint alleges that on "various dates" in May, September, October, and November 2010, the Hospital, by Patricia Heasley and/or Tammy Bean, enforced the rule described above by enforcing it against employees who wore SEIU insignia during work time.[10] The General Counsel indicated on the record that the following evidence fell under this allegation of the complaint. On May 17, 2010, Gilmore was wearing two union buttons on her uniform. As she was walking though a non patient care area about to start her shift, Heasley told Gilmore that she was not allowed to wear anything that depicts the Union in the hospital in patient care areas.[11] Gilmore replied that she was not aware of that and that according to the dress code she was not supposed to wear anything offensive to the patients and that her uniform was supposed to be neat and clean, and that was what she was doing. Heasley said that it was a rule in the policy manual; Gilmore said she had never seen it before. About 10 minutes later Heasley returned and gave Gilmore two pages from the policy manual described above concerning the wearing of buttons and pins.[12] As previously mentioned, Mary Lynne Brown works at the Hospital as a physical therapist assistant; her supervisor is Tambria Elizabeth Bean, the Hospital's director of rehab services. On September 16 Bean saw Brown wearing an SEIU pin on or around her identification badge while in a patient care area. Bean told Brown that hospital policy prohibited wearing a pin like that in patient care areas and asked Brown to remove the pin. Then on October 28 Heasley called Bean and complained that Brown was wearing the Weingarten rights card and a pin on her identification badge. Bean summoned Brown to the department area; Brown was still wearing the Weingarten card attached to her identification badge and the pin. Bean again told Brown that it was against hospital policy to wear those items in patient care areas and she again asked Brown to remove them; Brown did so. On October 28, 2010, the Hospital gave Brown a counsel-

[10] Patricia Ann Martinez, an employee, testified to an event that occurred in *August* 2010. That testimony is not covered by any allegation in the complaint and I therefore do not decide whether it was unlawful.

[11] Gilmore's first testified that Heasley said the she could not wear anything that depicts the Union in the hospital. Gilmore then testified that Heasley mentioned "patient care areas." During cross-examination Gilmore reverted to her first version, only to be presented with her affidavit in which she describes Heasley's remarks as being limited to "patient work areas." I conclude Heasley said "patient care area." Gilmore's testimony was sometimes evasive, combative, and unbelievable. I credit her testimony only to the extent described in this decision.

[12] Heasley testified that she did not recall this incident.

ing memo that indicated that Brown had previously been verbally warned on September 16 to remove a "SEIU pin on (her) badge." It indicated:

> Previously counseled employee to remove SEIU pin which was pinned to her badge/ [illegible]. Observe employee still wearing SEIU pin and SEIU attachments [illegible] to request removal of those items, employee questions reasons this is a policy guideline.

Finally, the counseling memo instructed: "Do not wear such items at any time."[13] Heasley admitted that in late October 2010 Gilmore came out of a patient room wearing a union pin and that she asked Gilmore to remove the pin. Gilmore refused and asked to speak with Morgan. Heasley then called Morgan and allowed Gilmore to speak with her. After that conversation Gilmore removed the pin. The next day the scene was repeated as Heasley again saw Gilmore wearing a union pin in a patient care area. Heasley again called Morgan but this time Gilmore refused to remove the pin after speaking with Morgan. Morgan instructed Heasley to send Gilmore home, staffing levels permitting. When security personnel arrived to escort Gilmore from the premises Gilmore finally removed the pin. On November 5, 2010, Heasley prepared a written warning for Gilmore. The warning indicated:

Employee has been verbally counseled on 2 occasions regarding dress code, however, continues to not adhere to dress code. .Supervisor requested that employee adhere to dress code by removing pin from uniform while in patient care area on October 27th. After much argument employee complied. On October 29th and 30th employee continued to violate dress code wearing pin on badge while in patient care area, which was subsequently removed after being addressed by supervisor and charge nurse

The warning was later presented to Gilmore but she refused to sign it.[14] On November 9 Heasley saw Gilmore wearing the Weingarten rights card of her identification badge while in a patient care area. She then summoned Gilmore for a meeting: also present were Cathy Onstadt, a registered nurse, and Julian Quinones, a union representative. Heasley said that on numerous occasions she had told Gilmore that she was not complying with the dress code. Heasley said either remove the union item or go home. Gilmore then spoke privately with Quinones and Gilmore decided not to remove the card. She then told this to Heasley, who then told her to go home. On November 9 Heasley provided Morgan with a written version of those events.[15]

Analysis

I have already concluded above that the Hospital unlawfully implemented a revised appearance and hygiene policy. I have described above a number of instances when the Hospital enforced the unlawful policy against employees by telling them that they could not wear buttons and the like supporting the SEIU in patient care areas. It follows that by enforcing the unlawful policy the Hospital again violated Section 8(a)(1). *Saint Vincent Hospital,* 265 NLRB 38, 42 (1982).

C. No-Access Allegations

The complaint alleges that since September 2010 the Hospital has maintained the following rule:

> An Off-duty employee is not allowed to enter or re-enter the interior of the Hospital or any Hospital work area, except to visit a patient, receive medical treatment, or conduct hospital-related business.
>
> The Hospital's employee handbook contains the following:
>
> No-Access Policy
>
> Off-duty employees may access the Hospital only as expressly authorized by this policy. An off-duty employee is any employee who has completed or not yet commenced his/her shift.
> An off-duty employee is not allowed to enter or re-enter the interior of the Hospital or any Hospital work area, except to visit a patient, receive medical treatment, or conduct hospital-related business. "Hospital related-business" is defined as the pursuit of an employee's normal duties or duties as specifically directed by management.
>
> An off-duty employee may have access to non-working, exterior areas of the Hospital, including exterior building entry and exit areas and parking lots.
>
> Any employee who violates this Policy will be subject to disciplinary action up to and including termination.

I conclude from Morgan's uncontested and credible testimony that any "duties as specifically directed by management" would require the Hospital to pay the employee for the time spent performing those duties. I further conclude that employees clearly understand that if the Hospital specifically directs them to perform duties they will be paid for the performance of

[13] The foregoing facts are based on Bean's credible testimony and the written counseling that was offered into evidence by the General Counsel. The General Counsel presented the testimony of Brown at hearing and she testified to events that occurred on September 22 and November 9. But the General Counsel never asked Brown to reconcile the dates in the written counseling with her testimony. To the extent that Brown's testimony differs from that of Bean and the written counseling, I do not credit Brown's testimony.

[14] Gilmore testified to an incident involving Heasley; Gilmore first testified that she thought it occurred in September 2010, then in November 2010, and finally settled for October 26, 2010, in the medical-surgical unit near the nurses' station. Gilmore was again wearing two union buttons on her uniform. Gilmore testified that Heasley told her to remove the buttons, that she "cannot wear them in the hospital" and that she "can't wear anything that says Union in the hospital." But later Gilmore added that Heasley told her that she could not wear the buttons in patient care areas. Gilmore refused to remove the buttons, indicating that she knew her rights. So Heasley called Morgan and Heasley informed Gilmore to remove the buttons or else she was suspended. Gilmore testified that she removed one button, but later testified that she took off both buttons. To the extent that Gilmore's testimony conflicts with the written warning and Heasley's testimony, I do not credit Gilmore's testimony.

[15] The foregoing facts are based on a composite of the credible portions of the testimony of Gilmore, Heasley, and Heasley's written account of those events.

those duties. Indeed, the patchwork of laws in this country governing the employer-employee relationship requires no less.

Analysis

I first examine the facial validity of the rule. In *Tri-County Medical Center,* 222 NLRB 1089 (1976), the Board held that an employer's rule barring off-duty employees access to their employer's facility is valid only if it limits access solely to the interior of the facility, is clearly disseminated to the employees, and applies to off-duty access for all purposes, not just for union activity. *Sodexo America, LLC,* 358 NLRB No. 78 (2012), involved a no-access rule identical in all material respects to the one in this case and the Board found that the rule was unlawful. In doing so the Board concentrated on the portion of the rule allowing access:

> [T]o conduct hospital-related business . . . "Hospital related-business" is defined as the pursuit of an employee's normal duties or duties as specifically directed by management.
>
> From this the Board concluded that:
>
> Because the rule gives the Respondents free rein to set the terms of off-duty employees access, we find the that it violates Section 8(a)(1) of the Act.[footnote omitted]

Notwithstanding my finding that "duties as specifically directed by management" would require the Hospital to pay the employee for the time spent performing those duties and that employees clearly understand that if the Hospital specifically directs them to perform duties they will be paid for the performance of those duties, I am obligated to conclude that by maintaining a no-access rule that on its face allows the Hospital free rein to allow off-duty access to the facility for certain activities but forbidding such access for activities protected by Section 7 of the Act, the Hospital violated Section 8(a)(1).

I turn now to address the issue of what the actual practice has been concerning off-duty employee access. Morgan admitted that notwithstanding the language of the rule, employees are allowed to enter the premises while off duty to pick up a paycheck stub, submit a schedule request, apply for a transfer, and to attend employee benefit meetings and retirement parties; employees are not paid when they enter the facility for these purposes.[16] Similarly, Heasley admitted that off-duty employees were allowed to enter the facility to attend retirement parties and baby showers and to collect their paystubs. Martinez credibly testified that she had entered the facility while off duty to attend baby showers, wedding showers, and to take a test that was required by the Hospital. Gilmore credibly testified that she entered the facility while off duty to attend a baby shower in February 2011. Brown has gone inside the Hospital while off duty to pick up her paycheck and attend retirement and baby shower parties. For example, for the baby shower Brown and others created a flyer inviting employees to attend and put it on a bulletin board. That event was held in the Playa Room of the Hospital; Hospital permission was given to use that room for that event. Liberty has returned to the hospital premises while off duty to pick up her pay stubs, talk to friends that worked in the ICU and telemetry unit, talk to insurance representatives, and attend retirement parties. For example, in the spring 2010, Liberty entered the facility while off duty to attend the retirement party of Evelyn Expose. Expose worked as a registered nurse in the ICU and the party was held in the Playa Room. Other off-duty employees also attended the retirement party and the Hospital provided food from the cafeteria for the event.

The complaint alleges that on about August 20, 2010, the Hospital, through Heasley, enforced the no-access rule by applying it against an off-duty employee present in the hallway outside the Hospital's cafeteria in violation of Section 8(a)(1). On August 20, 2010, Liberty, while off duty, met Glynnis Ortiz, a CNA representative, in the hospital's cafeteria to discuss the status of negotiations that were ongoing between the Hospital and the CNA. They then put brochures and pamphlets on a table and met with two or three other nurses. After about 1½ hours Julio Duarte, head of security, asked to speak with Liberty in the hallway outside the cafeteria. Once there Duarte told Liberty that they had to pack up and leave; Liberty said okay. She returned to the cafeteria and told Ortiz what Duarte had said. Ortiz and Liberty did not leave immediately; rather they spent about 20 minutes packing up and speaking to nurses. Duarte again approached them and said that they were causing a commotion and they had to leave. Liberty agreed to leave. Liberty then called the house supervisor and asked whether they could use the ICU lounge to meet with the nurses; the house supervisor at first said that they could, but Liberty heard Heasley's voice in the background saying that they could not, so the house supervisor then said that they not use that room. After they left the cafeteria Liberty and Ortiz stood outside in the hallway. Duarte approached them for a third time, this time with Heasley. Heasley said that Liberty was not allowed in the hospital grounds while she was off duty.[17]

Similarly, the complaint alleges that on or about September 21, 2011, the Hospital, by Larry Nance, enforced and orally promulgated the no-access rule described above by applying it against an employee who was in the Hospital's cafeteria when

[16] The Hospital's counsel attempted to get Morgan to agree, through leading questions, that this practice was consistent with the no-access rule as written. I do not credit any testimony in this regard; it was inconsistent with Morgan's more credible testimony that the rule as written required the Hospital to pay all employees allowed access pursuant to the rule. Employees were never informed of the fabricated interpretation and it would defy common sense to think that employees would read the rule to mean that attending a retirement party while off duty was a duty that was "specifically directed by management."

[17] These facts are based on Liberty's credible testimony; her demeanor was convincing and she gave the testimony while being employed by the Hospital. Also, Ortiz corroborated portions of Liberty's testimony. Heasley testified that she did not recall this incident. I have considered Duarte's testimony that he received a phone call that a CNA representative was trying to meet with employees in the cafeteria, so he went there and saw the CNA representative, Liberty and two other employees Duarte told them that cafeteria was not a meeting place for them and they could not have their meeting there. After some discussion two of the employees left and Liberty and Ortiz started to walk towards the ICU break room. Duarte claimed that he was not present for any conversation with Heasley. I do not credit the testimony of Heasley and Duarte to the extent that it is inconsistent with the facts described above; their demeanor was both uncertain and unconvincing.

off duty. Paulette Navarro works for the Hospital as a licensed clinical social worker; she has worked there since June 2008. On September 21, 2011, while off duty Navarro entered the cafeteria around noon and had lunch with Christina Albin-Lax, who was then the newly appointed negotiator for the SEIU. Navarro then introduced Albin-Lax to other employees who happened to be in the cafeteria. After about 30 minutes Navarro noticed Larry Nance, a security officer, watching her, Albin-Lax, and another employee at the table speaking to Albin-Lax. This continued for about 10–15 minutes, at which time Nance approached the table and asked Albin-Lax whether she had notified Morgan before Albin-Lax came to the Hospital. Albin-Lax responded that she had done so and left a message for Morgan to that effect. Albin-Lax then called Morgan; Morgan indicated that she had not yet listened to her messages and told Albin-Lax to call her on her mobile phone next time. Lance left and Navarro continued to invite employees to come to their table and meet Albin-Lax. Lance then reappeared and told Navarro that he understood that Navarro was not working that day; Navarro answered that he was correct. Lance asked if Navarro knew that she was not supposed to be there while off duty. Navarro said that she understood that anyone can be in the cafeteria; that it was a public place. Navarro explained that she understood that the Labor Board ruled that any employee can be in the cafeteria while off duty. Albin-Lax then again called Morgan, who explained that Lance was following the Hospital's rules. At about 2 p.m. Navarro left the cafeteria.[18]

Analysis

I have concluded above that the Hospital's no-access rule is, on its face, unlawful. It follows that this rule may not serve as a basis for excluding off-duty employees from entering the Hospital to engage in activities protected by the Act. *Tri-County Medical Center,* supra. I have also concluded that the Hospital allows its off-duty employees to enter the facility for a wide range of activities not directly related to the performance of their normal duties. It follows that the Hospital may not then exclude off-duty employees from entering the facility to engage in activities protected by the Act. The Hospital violated Section 8(a)(1) by requiring off-duty employees engaged in union activity to leave the facility.

Next, the complaint alleges that on about September 24, 2010, the Hospital, by Julio Duarte, enforced an overly broad off-duty access rule by orally prohibiting an off-duty employee access to an area outside the Hospital building, thereby violating Section 8(a)(1). On September 24, 2010, at around 7 a.m. Martinez went to the facility to vote and to be an observer for the SEIU at the election; she was off duty that day. After being told that her service as an observer was not needed, she voted and then left at around 7:30 a.m. She then went to a bus that the SEIU had station outside the Hospital's property and visited with other SEIU members. She then left the bus at around 10:45 a.m. and returned to the Hospital's property and lingered outside the facility near an employee entrance a short distance from a parking lot. There is no evidence that Martinez engaged in union activity during that time. After being in that area for about 10–15 minutes Julio Duarte, then director of facilities, approached her and said that Martinez needed to leave or he was going to call the cops. Martinez then left.[19]

Analysis

In his brief the General Counsel states "Here on September 24 Martinez stood in an area outside of the hospital building for about 10 minutes." His does not describe any union activity or other conduct that implicated Section 7 concerns that Martinez engaged in during that time. I dismiss this allegation of the complaint. *Continental Group,* 357 NLRB No. 39 (2011).

D. Education Fund Allegation

The complaint alleges that since May 2011 the Hospital has unilaterally ceased making contributions to the SEIU United Healthcare Workers West and Joint Employer Education Fund. Article 18(c) of the most recent contract required the Hospital to contribute a specified amount to the SEIU and Joint Employer Education Fund. The Hospital also agreed to be bound by the terms of the trust agreement, the plan document, and the rules and regulations adopted by the Trustees of the Fund. On April 22, 2009, the Hospital made a payment to the Education Fund for the 2008 calendar year and on May 5, 2010, the Hospital made a payment to the Fund for the 2009 calendar year; it has not made any payments since then. As previously indicated, that contract expired on December 31, 2009, and has not been renewed or extended. During bargaining the Hospital sought to eliminate article 18(c) from a succeeding contract, but there has no agreement or impasse.

[18] The foregoing facts are based on a composite of the credible testimony of Navarro and Albin-Lax. The testimony was mutually corroborative and their demeanor was convincing. Lance did not testify.

[19] The foregoing facts are based on Martinez' credible testimony. Duarte testified that on that day he received a phone call from a superintendent for a construction company performing work at the Hospital. According to Duarte, the superintendent complained that there was a man present in an unsafe area near the construction. So at about 9 a.m. Duarte went to the area and saw an organizer from the SEIU in the driveway used by ambulances as they approached the Hospital. Duarte told the organizer to move to the public sidewalk and the organizer did so. Yet the Hospital has its security officers use a security action assistance report when they encounter trespassing and no such report was produced by the Hospital covering the incident described by Duarte. Duarte claimed that he remained in the area until about 11 a.m. or later when Martinez exited the hospital and stopped and stood in the area outside the employee entrance. Duarte then asked Martinez if she had voted; she indicated that she had done so. Duarte then told Martinez that she could not remain in that area for safety reasons; he denied that he threatened to call the police or that Martinez had to leave the property of the Hospital. But Duarte admitted the Hospital allowed employees to use that area to enter and exit the facility and was unable to recall any message from the Hospital cautioning employees about safety concerns while in that area. Duarte also testified that construction work was being performed at that time, but it turns out that his testimony was based not on his personal observation but instead was based on information in a report that was not sufficiently tied to the time and place at which Martinez was present. Duarte's demeanor was entirely unconvincing. I conclude Duarte's testimony, to the extent it differed from Martinez' testimony, was either exaggerated or simply fabricated for trial purposes

Analysis

Upon the expiration of a contract an employer is generally not free to unilaterally cease making contributions to benefit funds provided in the expired contract. *N. D. Peters & Co.,* 321 NLRB 927, 928 (1996). In its brief, the Hospital argues that under the plan documents and rules and regulation governing the Education Fund:

> Respondent's obligation to make Contributions to the Education Fund is coextensive with and expressly contingent upon the existence of a Collective Bargaining Agreement or participation agreement that is "presently in force."

I have examined the provisions relied upon by the Hospital and conclude that none even remotely support this contention. *KBMS,* 278 NLRB 826 (1986). By unilaterally failing to continue to make payments to the Education Fund, the Hospital violated Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

1. By changing its appearance and hygiene policy without first giving the SEIU an opportunity to bargain about the change, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By changing its appearance and hygiene policy because employees engaged in union activity, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and 2(6) and (7) of the Act.

3. By enforcing the changed appearance and hygiene policy by telling employees that they cannot wear items such as buttons, pins, and stickers supporting a labor organization in patient care areas, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and 2(6) and (7) of the Act.

4. By maintaining a no-access rule that on its face allows the Hospital free rein to allow off-duty access to its facility for certain activities but forbidding such access for activities protected by Section 7 of the Act, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and 2(6) and (7) of the Act.

5. By requiring off-duty employees engaged in union activity to leave the facility the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and 2(6) and (7) of the Act.

6. By unilaterally failing to make payments to the Education Fund, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I have found that Respondent unlawfully made changes to its appearance and hygiene policy. I shall require it therefore to rescind the following from that policy: "Unless issued by the hospital, items such as buttons, pins and stickers may not be worn in patient care areas." I have found that Respondent unlawfully maintained a no-access rule that on its face allows it free rein to allow off-duty access to the facility for certain activities but forbidding such access for activities protected by Section 7 of the Act. I shall require it therefore to rescind that rule. I have found that Respondent unlawfully required off-duty employees engaged in union activity to leave the facility. I shall require it therefore to allow off-duty employees to enter the facility to engage in union activity. I have found that Respondent unlawful failed to continue to make payments to the Education Fund. I shall require it therefore to make whole all unit employees covered by the Education Fund by making all delinquent contributions to the fund on behalf of all employees, including any additional amounts due that fund in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979).[20]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[21]

ORDER

The Respondent, Marina Del Rey Hospital, Marina Del Rey, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing its appearance and hygiene policy without first giving the SEIU an opportunity to bargain about the change.

(b) Changing its appearance and hygiene policy because employees engaged in union activity.

(c) Enforcing the changed appearance and hygiene policy by telling employees that they cannot wear items such as buttons, pins, and stickers supporting a labor organization in patient care areas.

(d) Maintaining a no-access rule that on its face allows the Hospital free rein to allow off-duty access to its facility for certain activities but forbidding such access for activities protected by Section 7 of the Act.

(e) Requiring off-duty employees engaged in union activity to leave the facility.

(f) Unilaterally failing to continue to make payments to the Education Fund.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the following from the appearance and hygiene policy: "Unless issued by the hospital, items such as buttons, pins and stickers may not be worn in patient care areas."

(b) Rescind the no-access rule that on its face allows the Hospital free rein to allow off-duty access to facility for certain activities but forbidding such access for activities protected by Section 7 of the Act.

---

[20] There is no contention by the General Counsel that unit employees directly suffered any loss as a result of Respondent's unlawful conduct.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Allow off-duty employees to enter the facility to engage in union activity.

(d) Make unit employees covered by the Education Fund whole in the manner described in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of contributions due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Marina del Rey, California, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 14, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. January 16, 2013

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change our appearance and hygiene policy without first giving the Service Employees International Union, United Healthcare Workers-West an opportunity to bargain about the change.

WE WILL NOT change our appearance and hygiene policy because employees engaged in union activity.

WE WILL NOT enforce the changed appearance and hygiene policy by telling employees that they cannot wear items such as buttons, pins, and stickers supporting a labor organization in patient care areas.

WE WILL NOT maintain a no-access rule that on its face allows the Hospital free rein to allow off-duty access to its facility for certain activities but forbidding such access for activities protected by Section 7 of the Act.

WE WILL NOT require off-duty employees engaged in union activity to leave the facility.

WE WILL NOT unilaterally discontinue making payments to the Education Fund.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the following from the appearance and hygiene policy: "Unless issued by the hospital, items such as buttons, pins and stickers may not be worn in patient care areas."

WE WILL rescind the no-access rule that on its face allows the Hospital free rein to allow off-duty access to facility for certain activities but forbidding such access for activities protected by Section 7 of the Act.

WE WILL allow off-duty employees to enter the facility to engage in union activity.

WE WILL make unit employees covered by the Education Fund whole in the manner described in the remedy section of this decision.

MARINA DEL REY HOSPITAL

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."